

[Advisory Opinion 1997-1]

Montgomery County Ethics Commission Advisory Opinion

January 22, 1997

Presently before the Commission is a November 11, 1996, request from a member of the Montgomery County Board of Appeals for an advisory opinion concerning the application of Chapter 19A (County Ethics Law) and §2-109¹ (Board of Appeals Code of Ethics) to political campaign activities the member had engaged in and intends to continue pursuing.

For the reasons explained below, it is the Commission's opinion that:

1. The solicitation of campaign contributions by a member of the Board of Appeals does not constitute a per se violation of the County ethics law or the Board of Appeals Code of Ethics.
2. Although the solicitation of campaign contributions does not per se violate the County ethics law or Board of Appeals Code of Ethics, a Board member's political campaign conduct is not totally insulated from regulation under the County ethics law and the Board's Code of Ethics. Accordingly, the Board member should avoid engaging in acts that could lead a reasonable person to conclude that:
 - A. the member is using the prestige of the member's office for personal gain or the gain of another in violation of Section 19A-14(a). In this regard the Board member should avoid using the member's County title in connection with any campaign activity; or
 - B. the member is coercing or discriminating against another for the purpose of interfering with that person's freedom to engage in political activity in violation of Sections 19A-14(e) and 2-109. In this regard the Board member should not target for solicitation parties, witnesses, or attorneys who appear before the Board of Appeals.
3. The Board member's suggestions regarding future participation in political activities are appropriate and the member is encouraged to follow them; these are:
 - not allowing the member's name to be the sole name used on fund raising or partisan communications.
 - not allowing the member's name and address to be used for receiving campaign contributions.

¹ Unless the context indicates otherwise, section references are to the Montgomery County Code (1994), as amended.

- notifying the Ethics Commission of each fund raising event with which the member's name is associated for inclusion in a file open to the public.
- disclosing on the record the nature of any relationship with a person who appears before the Board as a party, witness, or attorney.

FACTS

The relevant facts are as follows. Since 1970, the Board member has been actively involved in political campaigns for Democratic candidates for various offices and for the Democratic Party on the local, State, and national levels. The member has served as a paid campaign staff person, a fund raising consultant, party official, and a volunteer. The member presently serves a party official at a national level. The member has hosted many fund raising and other political events in the member's home and served on the finance and steering committees of numerous campaigns.

The specific event that led to the Board member's request for an opinion grew out of an October 22, 1996, fund raising event which the member co-chaired. The event was publicized through an invitation mailed to over 2,200 people, largely in Montgomery County.

Governor Parris Glendening	Senator Paul Sarbanes	Senator Barbara Mikulski
Invite you to join us for <i>A Very Special Evening with a Very Special Person</i> GEORGE STEPHANOPOULOS at a Fundraising Reception to Benefit Campaign '96 The Montgomery County Democratic Coordinated Campaign Tuesday, October 22, 1996 7:00-8:30 p.m. <i>Home of Ben and Joyce Schlesinger</i> <i>6801 Broxburn Drive—Bethesda, Maryland</i>		
RSVP by enclosed card	[Board member] and Joan Stern Co-Chairs	\$500 Patron
or call 301-977-0015		\$250 Host
or [Board member's home telephone number]		\$125 Guest

Checks were to be made payable to "Campaign '96" and mailed to the Board member's home address. The Board member's request for advice indicates that the beneficiaries of the funds raised were the Montgomery and Maryland Democratic Parties and their activities in Campaign '96. The RSVP card stated, "Your contribution will be used in connection with federal elections and is subject to the limitations and prohibitions of the Federal Election Campaign Act. Contributions are not tax deductible for federal

income tax purposes. Paid for by Campaign ‘96—a project of the Maryland Democratic Party.”

The Board member’s request for advice states in part:

The names and addresses of those to whom this flyer was mailed were contained on several different lists, and the actual mailing was done in several places under independent supervision. The lists used included ones: (1) compiled by individuals based on contributions to past campaigns in Montgomery County, (2) maintained by the MCDCC [Montgomery County Democratic Central Committee] of major givers to the party, (3) developed by the National Jewish Democratic Council, and (4) developed by the Women’s Leadership Forum of the DNC [Democratic National Committee]. A separate mailing was sent by the Coordinated Campaign of the Maryland Democratic Party to a list that it had developed. Most of the Montgomery County–based mailing—and all of the Maryland state mailing—was handled by others without my participation or presence. Follow up calls were made by a number of people, including several who participated in “phone banks” organized by the MCDCC. I did not participate in those follow up activities.

I handwrote notes on the flyer to a number of personal and political friends and followed up a number of those notes with telephone calls in the week prior to the event. To my knowledge, none of these personal notes or telephone calls was directed to anyone who has appeared before the Board or has a pending case before the Board.

Approximately 175 people attended the event. The Commission assumes, for the purposes of this advice, that a number of individuals, including attorneys, who appear or may appear before the Board of Appeals received the invitation. There is no indication whether any of these individuals attended the event. The Commission has no basis for assuming that the Board member treated any person differently in subsequent Board actions because the person attended the fundraiser, made a contribution, or failed to contribute.

DISCUSSION

The Commission has identified two sections of the Montgomery County Code that appear relevant to the Board Member’s conduct under this set of facts, namely §§19A-16 and 2-109.

I. MONTGOMERY COUNTY ETHICS LAW

Section 19A-16 of the County ethics law provides in relevant part:

- (a) A public employee must not solicit a gift to the employee or another person or organization:
 - (1) from any business or person who:

- (A) is registered or must register as a lobbyist;
 - (B) does business with the County agency with which the public employee is affiliated; or
 - (C) is, or owns or operates a business that is, regulated by the County agency with which the public employee is affiliated;
- (2) during official work hours, or at a County agency, or from any other public employee who is supervised directly or indirectly by the public employee;
 - (3) while wearing all or part of an official uniform of a County agency, or while otherwise identifiable as a public employee;
 - (4) with the intent of affecting or offering to affect any action by a County agency.²

Section 19A-4(h) defines the term “gift” as:

Gift means the transfer of anything of economic value, regardless of form, without an exchange of consideration of at least equal value. **Gift does not include a transfer regulated by state or federal law governing political campaigns or elections.** (Emphasis added).

Given this definition, the first inquiry should be whether the transfers involved in the October 22nd fund raiser are “regulated by State law governing political campaigns or elections.”

Maryland Code (1957, 1993 Repl. Vol., 1996 Supp.), Article 33 (“Election Code”) contains detailed provisions concerning the electoral process in Maryland.³ Subtitle 26 of Article 33, entitled “Fair Election Practices,” extensively regulates campaigns in the State of Maryland. Article 33, Section 26-9 (“Contributions and expenses of persons not candidates”) heavily regulates election campaign financing and sets limits on campaign contributions to candidates and political committees. Sections 30-1 through 30-4 regulate disclosure of contributions by those doing business with the government.

Sections 30-1 *et. seq.* as well as all of subtitle 26, apply to both State and federal campaigns.⁴ Article 33, Section 26-1 states that “the provisions of [subtitle 26] shall

² A Board member is a public employee under the County ethics law. Section 19A-4(m)(3).

³ In fact, State legislation on this matter is considered so comprehensive as to have completely occupied the field and impliedly preempted any local laws on the subject. County Council for Montgomery County v. Montgomery Association, Inc., 274 Md. 52, 333 A.2d 596 (1975) (Montgomery County ordinances designated to regulate the campaign finance practices of candidates for County Executive and County Council held impliedly preempted by Article 33 of the Maryland Code.)

⁴ Although §26-9 purports to apply to county, State, and federal, the Federal Election Campaign Act, 2

apply to all elections in which ballots shall be cast pursuant to the provisions of this article.” The term “election” is defined as:

the process by which voters of the State, or any county or city thereof, vote for any party or public officer pursuant to the laws of this State or the United States, any constitution or constitutional amendment, public law, public act or proposition and unless otherwise indicated shall include all elections, primary, general, special, local, **congressional, presidential**, or statewide. It does not mean any municipal election other than in Baltimore City unless otherwise specifically provided for in this article. (Emphasis added).

Even though State law may be preempted as to federal elections, the Commission does not believe that the term “gift” in the County ethics law should be interpreted to **include** a transfer made in connection with a **federal** political campaign and yet to **exclude** a transfer made in connection with a **State** political campaign. Such an interpretation would not advance any rational legislative purpose.⁵ Therefore, the Commission believes that all transfers regulated by either State or federal campaign laws should be excluded from the definition of gift in the County ethics law.

Accordingly, any contributions which the Board member solicited as part of the October 22nd fundraiser are not “gifts” under the County ethics law, and the solicitation of those funds is not prohibited under section 19A-16.⁶

II. BOARD OF APPEALS CODE OF ETHICS

Section 2-109 sets out additional statutory provisions regulating the conduct of members of the Board of Appeals. Section 2-109 provides in relevant part:

(b) *Conduct prohibited.* No member shall:

* * *

(3) Solicit or accept any gift, favor, loan, service, promise, employment or thing which might influence or tend to influence the proper performance of his duty.

* * *

(c) *Exemptions.* No part of this section shall be construed to prohibit a

U.S.C. §§431–456 expressly preempts “any provision of State law with respect to Federal office.” 2. U.S.C. §453. The Maryland Attorney has opined that Article 33, §26-9 is fully preempted by the Federal Election Campaign Act and “may not be applied in any way to contributions given in connection with campaigns for Federal office.” 61 Op Att’y Gen. 363, 369 (1976); 70 Op. Att’y Gen. 96, 103 (1985).

⁵ A statute should be interpreted from a “commonsensical” perspective and constructions which are illogical or unreasonable should be avoided. *Frost v. State*, 336 Md. 125, 647 A.2d 106 (1994).

⁶ As a general matter, Article 33 does not regulate municipal elections other than in Baltimore City. Unregulated transfers relating to municipal political campaigns may well fall within the definition of the term “gift”.

member of the board of appeals from appearing in the pursuit of his private interests as a citizen, or from accepting or receiving any benefit by operation of law, or prosecuting or pursuing any claim, right, privilege or remedy which is his by operation of law.

Section 19A-3 provides that “[i]f any other County statute or regulation relating to conflicts of interest, financial disclosure, or lobbying disclosure is more stringent than this law, the more stringent provision applies.” Because Section 2-109 does not contain any limitation on the term “gift,” Section 2-109 should not **automatically** be read to exclude transfers regulated by State law governing political campaigns or elections, as the County ethics law does.

However, before this section may be applied to the case at hand, it must be determined, as a threshold matter, whether the comprehensive federal and State laws regulating campaign finance have preempted the application of §2-109 to campaign solicitations.

A. State Preemption

While a chartered county may have authority to enact certain legislation, that legislation may still not pass muster if it is in conflict with or is preempted by State law. If a local law is struck down for either reason, the chartered county’s authority to enact the legislation is irrelevant. County Council for Montgomery County v. Montgomery Association, 274 Md. 52, 57, 333 A.2d 596, 599 (1975). In general, a State law may void a local law in one of three ways: (1) under the conflict doctrine, (2) by express preemption, or (3) by implied preemption. Talbot County v. Skipper, 329 Md. 481, 487-8, 620 A.2d 880, 883 (1993).

The Maryland Court of Appeals first applied the doctrine of implied preemption in County Council for Montgomery County v. Montgomery Association. 274 Md. 52, 57, 333 A.2d 596 (1975), when reviewing three county laws regulating campaign finance practices of political candidates in Montgomery County. The Court found that the General Assembly, by enacting comprehensive legislation in the area, “has completely occupied the field of regulation of campaign finances and thus made clear its intent to exclude local legislation on the subject.” Id. At 57,333 A.2d at 599 (footnote omitted). The Court found it unnecessary, therefore, to decide whether the county had the initial authority to enact its local law in the first place.

B. Federal Preemption

State law is preempted under the supremacy clause of the U.S. Constitution, art. VI, cl. 2, in three circumstances. First, Congress can explicitly state what, if any, preemptive effect a federal law will have. Second, in the absence of explicit language, the court can infer preemption from a scheme of federal regulation which is so pervasive as to make reasonable the conclusion that Congress left no room for the states to regulate in that area. Finally, state law is preempted to the extent it actually conflicts with federal law. English v. General Electric Co., 496 U.S. 72, 78–79, 110 S.Ct. 2270, 2275, 110

L.Ed.2d 65 (1990). For supremacy clause purposes, a local law is analyzed in the same way as a statewide law. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

As already noted, the Federal Election Campaign Act, 2 U.S.C. Sections 431–456 expressly preempts “any provision of State law with respect to election to Federal office.” 2 U.S.C §453. Accordingly, an express preemption analysis must be employed. “If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” CSX Transportation, Inc. v. Easterwood, 113 S.Ct. 1832, 1737, 123 L.Ed.2d 387 (1993).⁷

C. Is Section 2-109 Preempted?

The Commission does not believe that either State or federal campaign finance laws preempt the application of Section 2-109 **under all circumstances**.

In reaching this conclusion, the Commission reviewed an Attorney General opinion regarding a Prince George’s County ordinance “requiring that all persons who do business with the County report campaign contributions made to elected officials in Prince George’s County; providing for restriction upon the activities of persons registered as lobbyists; and providing that persons contracting with the County file required reports.” In a letter dated April 4, 1990, the Maryland Attorney General opined that the bulk of the ordinance was preempted by State law. The Attorney General stated:

With one exception, Council Bill 17-1990 deals with the “matter of election campaign financing.” It prohibits certain contributions . . . requires a statement of certain contributions . . . and sets attribution rules for these contributions However, the State Election Code, Article 33, fully occupies the field of campaign finance regulation. Article 33 addresses both campaign contributions and disclosure of contributions by those doing public business. See Article 33, §§26-9 and 30-1 through 30-4.

75 Op. Att’y Gen. 343 (1990 [No. 90-018, April 4, 1990] (footnote omitted). However, the Attorney General concluded that one provision of the ordinance was not preempted:

The one provision of Section 2 of Council Bill 17-1990 that is not preempted, in our view, is proposed Code §2-295.1(a)(1), which prohibits a lobbyist from “[a]ttempt[ing] to influence the vote of any member of the County Council by the promise of financial support of the member’s

⁷ In Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the Court held that where an express preemption clause “provides a reliable indicium of congressional intent with respect to State authority,” a court should not consider implied theories of preemption. 112 S.Ct. at 2618. The Eleventh Circuit wrote “[n]one of our sister circuits that has considered application of the Cipollone rule to various statutes has yet found a pre-emption clause that was not a reliable indicium of congressional intent.” Myrick v. Fruehauf Corp., 13 F.3d 1516, 1525 (11th Cir. 1994).

candidacy or by threat of financial opposition to the member’s candidacy.”

Under Article 40A, §6-301 [presently codified at Maryland Code (1995 Repl. Vol.), §15-803 of the State Government Article], each local government is directed to “enact lobbyist regulation provisions substantially similar to the provisions of Title 5 of [Article 40A] which shall be modified to the extent necessary to make the provisions relevant to that jurisdiction and which may be further modified to the extent deemed necessary and appropriate by and for that jurisdiction.” This provision does not authorize a local government to regulate campaign contributions by lobbyists, because the matter of campaign contributions is separately regulated by the Election code. *See* 71 Op. Att’y Gen. 108, 109 (1986); 68 Op. Att’y Gen. 252, 261–63 (1983).

Nevertheless, in our view, a prohibition against “[a]ttempting to influence the vote of any member of the County Council” by promising future contributions, or threatening to withhold future contributions, is sufficiently **distinct** from the regulation of the contributions themselves to fall outside of the zone of preemption. The State Election Code does not regulate the nature of the discourse between lobbyists and officials. Thus, Code §2-295.1(a)(1) is a proper exercise of the County’s power under Article 40A, §6-301. (Emphasis added) (footnote omitted).

The Commission finds the reasoning by the Attorney General persuasive and, therefore, concludes that federal and State laws regulation campaign financing do not automatically preempt county laws regarding ethics, even though the County law may touch upon the same transaction.

D. Does Section 2-109 Prevent a Board Member from Participating in Political Campaigns?

In construing Section 2-109, the rules of statutory construction set out by the Court of Appeals in Maryland State Police v. Warwick Supply & Equipment Co., Inc., 330 Md. 474, 624 A.2d 1238 (1993), appear to be particularly relevant:

Again and again, we have said that the cardinal rule of statutory construction is to ascertain and effectuate the legislative intention. Harford County v. University, 318 Md. 525, 529, 569 A.2d 649 (1990); Jones v. State, 311 Md. 398, 405, 535 A.2d 471 (1988). While the language of the statute is the primary source for determining legislative intent, State v. Fabritz, 276 Md. 416, 421, 348 A. 2d 275 (1975), the plain meaning rule is not absolute. Kaczorowski v. City of Baltimore, 309 Md. 505, 513, 525 A.2d 628 (1987). Rather, the statute is to be construed reasonably with reference to the purpose, aim, or policies of the Legislature reflected in the statute. *Id.* Words in a statute must, therefore, be read in a way that advances the legislative policy involved. Morris v. Prince George’s Co., 319 Md. 597, 603–04, 573 A.2d 1346 (1990). And where two statutes

purport to deal with the same subject matter, they must be construed together as if they were not inconsistent with one another. Police Comm'r v. Dowling, 281 Md. 412, 418, 379 A.2d 1007 (1977); Comm'n on Md. Discipline v. Bendler, 280 Md. 326, 330, 373 A.2d 1232 (1977). In this regard, the courts strongly favor a harmonious interpretation in construing the related statutes which gives full effect to both statutes, even where they were enacted at different times and without relation one another.

Id. at 483.

In light of these principles of statutory construction, the Commission does not find that Section 2-109(b)(3) precludes Board members from soliciting campaign contributions for candidates under all circumstances or precludes Board members from soliciting campaign contributions to fund their own campaigns for elective office. The Commission does not believe that the application of the rules of statutory construction set out in Maryland State Police v. Warwick support an interpretation that totally precludes such activities. In order to preclude such political activities, Section 2-109 would need to include more express and defined limitations.

Although the Supreme Court has specifically upheld one state law containing restrictions on the political activity of State employees,⁸ Maryland has enacted legislation ensuring that public employees' political activities and expression are preserved. Maryland Code (1957, 1996 Repl. Vol.), Article 24, Title 13 provides:

13-102. Public policy

Employment by a local entity does not affect any right or obligation of a citizen under the Constitution and laws of the United States of America or under the Constitution and laws of this State.

13-103. Employee rights.

Except as otherwise provided in this title, an employee of a local entity:

- (1) May freely participate in any political activity and express any political opinion; and
- (2) May not be required to provide any political service.⁹

Although Section 13-103 applies to employees and not members of boards and committees, the Commission finds this State law a persuasive factor in concluding that the Commission should not read into Section 2-109 a complete ban on involvement in political campaigns.

Although states and counties may enact statutes restricting the right of a public employee to participate in the political process, laws doing so must be plain and express. 63 Am. Jur. 2d §39 Public Officers and Employees (1984). A strong public policy exists in favor of eligibility for public office and any ambiguities in a statute purporting to limit such eligibility should be construed in favor of participation in the political process. For

⁸ Broderick v. Oklahoma, 413 U.S. 601 (1973).

⁹ Montgomery County is a local entity within the meaning of this statute. Section 13-101(1).

example, in imposing limitations on the political activity of members of this Commission and the Merit System Protection Board, the applicable law has done so expressly, with clear and unmistakable language. See §19A-5(b); County Charter §403. This is not the type of language found in §2-109(b)(3).

Moreover, the Commission believes Section 2-109 must be interpreted in a manner consistent with the County ethics law. See, Maryland State Police v. Warwick, 330 Md. 474, 624 A.2d 1238 (1993). As previously discussed, the County ethics law does not regulate a public employee's solicitation of campaign contributions. The Commission cannot justify imposing **by way of statutory construction** a limitation on the political activities of members of the Board of Appeals. Members of other quasi-judicial bodies are not limited in their political activities. See, e.g., Section 10B-3, Commission on Common Ownership Communities; Section 24A-4, Historic Preservation Commission; Section 27-2, Human Relations Commission; and Section 29-9, Landlord-Tenant Commission.

Finally, §2-109(c) expressly provides that "no part of this section shall be construed to prohibit a member of the board of appeals from appearing in the pursuit of his private interests as a citizen, or from accepting or receiving any benefit by operation of law, or prosecuting or pursuing any claim, right, privilege or remedy which is his by operation of law." The right to run for elected office may fall within this provision. Accordingly, the Commission believes subsection (c) provides further indication that the Council did not intend to impose a per se ban on members of the Board of Appeals from soliciting campaign contributions.¹⁰

CONCLUSION

As discussed, the Ethics Commission is by no means precluded from applying the County ethics law or the Board of Appeals Code of Ethics to the conduct of a public employee merely because that conduct is political. In 62 Op. Att'y Gen. 425 (1977), the Maryland Attorney General opined that while a State employee's political activity is protected under State law and may not be automatically banned as violative of the State ethics code, such activity is not thereby immunized from review under the ethics code. For example, an employee may violate Section 19A-15 if the employee discloses confidential information while engaging in political activity.

Thus, while the County ethics law and §2-109 may not be read as a ban on participation in political activity (including seeking elected office), the Commission may review a Board member's activities to determine whether he or she has "solicit[ed] or accept[ed] any gift, favor, loan, service, promise, employment or thing which might

¹⁰ The Commission also recognizes that Charter §405 states, "No officer or employee of the county shall be prohibited from participating in politics or political campaigns; however, no employee shall be obligated to contribute to an election campaign or to render political service." In a November 13, 1989, memorandum to the County Council the County Attorney opined that the restrictions imposed on the political activity of members of the Ethics Commission by §19A-5(b)(2) were consistent with Charter §405. The County Attorney concluded that, while the question is not beyond doubt, §405 does not preclude the Council from enacting legislation to prohibit or limit the political activity of members of boards and commissions.

influence or tend to influence the proper performance of his duty.” Likewise, the Commission may examine whether a Board member has misused his or her prestige of office in violation of Section 19A-14(a) or attempted to coerce or discriminate against a person for the purpose of interfering with that person’s freedom to engage in political activity in violation of Section 19A-14(e).

The Commission does not find, however, that the facts presented in the Board member’s request constitute a violation of the County ethics law or Section 2-109. We believe that the guidelines suggested in the Board member’s letter are reasonable and appropriate voluntary restraints on the member’s political activity.

Although the Commission does not believe that County laws prohibit the Board member’s political activities, the Commission is concerned that participation in political campaign activities may be inconsistent with the responsibilities of membership on a quasi-judicial County board or commission.¹¹

Membership on a board or commission that exercises quasi-judicial powers requires adherence to the highest standards of balance and objectivity, and the demands of a political advocate may often be in conflict with such objectivity. Not only should such a conflict be avoided, but the appearance of a conflict should also be avoided.

Except for the Merit System Protection Board and the Ethics Commission, members of quasi-judicial County boards and commission are not currently prohibited from participating actively in the political process. Such participation, this Commission believes, may lead to a conflict of interest, or the appearance thereof. This conflict can be avoided by requiring that the member choose between political campaign activity and service on a quasi-judicial board or commission.

To avoid this possible conflict, the Commission recommends that the Council consider legislation, and if necessary an amendment to Charter Section 405, to prohibit active participation in the political campaign process by any County board or commission member who serves in a quasi-judicial capacity.

[signed]
Laurie Horvitz, Chair
Montgomery County Ethics Commission

¹¹ The duties of the Board of Appeals include deciding petitions for special exceptions and variances from the County’s zoning ordinance and resolving appeals from decisions of various administrative agencies. See, Section 2-112.

